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IN THE

Supreme Court of the United States

October Term, 1977.

No. 76—811

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Petitioner,

v.

ALLEN BAKKE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief of the Queens Jewish Community Council and The Jewish Rights Council as *Amici Curiae* in Opposition to Petitioner.

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Interest of the *Amici*.

The Queens Jewish Community Council, *Amicus,* was founded in 1968 for the purpose of protecting and promoting the interests and well-being of members of the Jewish faith in New York City and elsewhere in company with the rights and interests of all United States citizens, and of protecting and promoting the Constitution's guarantees of liberty and equal opportunity for all American citizens as individuals equal before the law.

The Jewish Rights Council, *Amicus,* was founded in 1971 for the purpose of ensuring and promoting equality of all persons before the law, and has filed briefs as *Amicus* in

this Court in the cases of *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973); *Richmond School Board* v. *Board of Education,* 412 U.S. 92; *DeFunis* v. *Odegaard,* 416 U.S. 312, and *Milliken* v. *Bradley,* 418 U.S. 717.

Consent to Filing.

This brief of *Amici Curiae* is being filed with the consent of all parties to the proceeding.

Opinions Below.

The opinion of the trial court, the Superior Court of Yolo County, California, is not reported. The opinion of the Supreme Court of California is reported under the style of *Bakke* v. *Regents of University of California* at 18 Calif. 3d 34, 132 Calif. Rptr. 680, 553 P.2d 1152 (1976).

Statement of the Case.

Petitioner's State University medical school at Davis, California, was found to have reserved 16 of the 100 places in its freshman class specially for members of "insular" minority groups. Different standards of excellence for admission to these 16 places were applied as compared with the standards for admission to the remaining places which were open to applicants at large (including those of the "insular" minority groups). No amount of excellence—however outstanding—would suffice to permit any non-minority group member to any of these 16 places. Numerous applicants including the respondent Mr. Bakke, with credentials far superior to those of any of the applicants for the minority posts, were excluded by reason of this dual admissions program; while students with far lower objective indicia of excellence were admitted on the basis of their membership in certain racial or national groups.

Argument.

The foregoing statement of the facts of this case should suffice, without more, to require an automatic affirmance of the decision of the California Supreme Court holding the dual admissions program at Davis medical school to constitute an unconstitutional form of reverse discrimination.

The petitioner's State University medical school claims to have adopted the dual admissions plan as a form of affirmative action program in order to "counteract effects of generations of pervasive discrimination against discrete and insular minorities" (Petition for cert., p. 2). Accepting this as its actual motivation in no way overcomes the patent unconstitutionality inherent in the plan.

The applicable Constitutional principle could not be better stated than it was by Mr. Justice Douglas in *DeFunis* v. *Odegaard,* 416 U.S. 312, 336, where he wrote:

> "There is no Constitutional right for any race to be preferred . . . . There is no superior person by Constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color. Whatever his race, he had a Constitutional right to have his application considered on its individual merits in a racially neutral manner."

There is no logical connection between the instant case and cases where courts have upheld legally imposed quotas for hiring of minority applicants in employment areas from which they had been intentionally excluded or for determining the number of students from each race who shall attend previously intentionally segregated schools. Those are instances where discrimination was practised with the

aid of the law, and which the courts have found cannot be effectively reversed without the use of quotas. The wisdom and desirability of this means in such cases is not before the Court.

The instant case, by contrast, presents a situation where the record reveals no past history of intentional segregation to undo, and where the quotas imposed by the college involved had the sole function of assuring substantial minority group participation in the medical field on the assumption (derived from historical performance) that they would not so participate if their admissions were to be judged on the same color-blind merit test applied to applicants as a whole. Without a basis in the record—and none was found—to show a past history of legally fostered discrimination which this program was to undo,* there can be no other name for a program so designed to benefit a given race or group of races than discrimination on the basis of race—pure, simple and unadulterated. The best of motives cannot disguise this worst of practices, which carries with it the seeds of self-destruction for the very system which spawns it, by submerging the rights of the human individual which are sacred to our social system in favor of the interests of the amorphous group.

Until not many years ago, the affront to individual Constitutional rights to due process and equal treatment which virtually shriek from every aspect of petitioner's dual admissions plan would have made it unnecessary for such a case ever to reach this Court. It is a disturbing sign of our times that the newly rising preference for group

*Indeed, the medical school at Davis is only nine years old, and by petitioner's admission has striven almost from its inception to assist minority students to enter (Petition for cert., pp. 5, 7-8).

over individual rights has so confounded the approach of some of our courts* and governmental agencies to due process and equal protection questions that the rights of the individual, so long considered sacred and central in our Anglo-American heritage, stand in serious danger of becoming lost.

For this reason it is desirable to take a wider look at the origins and fundamental philosophy of affirmative action programs and officially sponsored racial identification surveys, in order fully to understand not only the implications of the present case in its posture before this Court, but also the direction which any pronounced rationale disposing of this case should take. For it is inconceivable that this Court should pass upon the merits of a case of this nature without making its opinion a landmark for future guidance of this nation's courts and governmental bodies at all levels.

Current affirmative action programs are essentially an outgrowth of some of the curious reasoning indulged by this Court in its rationale in *Brown* v. *Board of Education*, 347 U.S. 483. In *Brown*, where the Court finally faced head-on the law which it had promulgated some 60 years

*This Court recently had occasion to disapprove the judicial decisions in a number of employment quota cases, the decrees in which were based upon group rather than individual rights. *Washington* v. *Davis*, 426 U. S. 229, 244-45 (1976). And more recently this Court has rejected the group statistical rights theory of the equal protection clause as applied to housing zoning. *Arlington Heights* v. *Metropolitan Housing Corp.*, 50 L. Ed. 2d 450, 467 (Jan. 1, 1977). *See also EEOC* v. *Local 14*, 2d Cir. Docket No. 76-6150 (Mar. 21, 1977), reported in the New York Times of Mar. 22, 1977 at pp. 1, 34, in which the United States Court of Appeals took note of the widespread resentment engendered by overzealous enforcement employment practices which resulted in reverse discrimination. *N. Y. Times*, March 22, 1977, pp. 1, at 34, col. 3.

earlier in *Plessy* v. *Ferguson*, 163 U.S. 537, it rightly held that *Plessy* (with its "separate but equal" doctrine) was wrong, but it did so on an inappropriate rationale.

Plessy—at least to today's American societal consensus—appears as a bizarre distortion of Constitutional due process and equal protection guarantees: it should be apparent to any fairminded person that a government which allocates resources or opportunities according to race, color, or similarly irrelevant criterion, *by definition* is treating its citizens unequally and unfairly. It is treating them as members of groups and not as individuals who are entitled to equal consideration in their own rights. Any law—no matter how beneficient or otherwise sociologically advisable—which so discriminates must to a rational mind be violative of the Constitutional guarantees of due process and equal treatment to individuals before the law.

The dissent of Mr. Justice Harlan in *Plessy* made this point, pure and simple:

> "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." 163 U.S. at 554.

Yet, curiously, this Court in 1954 still felt unable to make so plan and correct a pronunciation. Instead, by its opinion in *Brown*, the Court found that *sociological and psychological statistical evidence* persuaded it that such governmental discrimination had deleterious side effects upon the psyches and learning incentives and abilities of the children of minority groups affected by such laws

and that *for that reason* such laws were necessarily unconstitutional.*

The danger inherent in such a psycho-sociological approach to fundamental rights was promptly pointed out by no less a formidable advocate of civil rights than the late Prof. Edmond Cahn, who wrote shortly after the decision in *Brown*:

> "It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the finding as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature. Today, . . . at least the leaders of the discipline—are liberal and egalitarian in basic approach. Suppose, a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; . . . What then would be the state of our constitutional rights?" "Jurisprudence", 1954 ANNUAL SURVEY OF AMERICAN LAW 809, at 826.

The Court's reluctance in *Brown* to announce outright that governmentally ordained discrimination by groups (of whatever category) is inherently violative of the Constitution and has no place in our society, and its insistence instead on relying upon sociological and psychological statistical data that should never have been necessary to

*By implication it suggested that the absence of such psychological and sociological sophistication in the days of *Plessy* v. *Ferguson* might have justified the *Plessy* doctrine of "separate but equal" in its day. We vigorously reject that suggestion, if it existed, in the *Brown* opinion. No government, we submit, can force separation of the races upon its citizens without on its face violating the Constitution.

prove the patent wrong involved, have been largely responsible for the imposition of a new type of reverse discrimination on our nation and the concomitant gross disordering of society. Plainly, if psychological and sociological statistics rather than straightforward legal criteria were to become our guidepost, then it was apparent that the psychological and sociological fact of statistical "de facto segregation," with or without government order, was disadvantageous to minority groups. *Ergo,* governments were now to be deemed to have the obligation to correct such "de facto segregation" wherever it existed. Increasingly there has been a tendency to slur over the fundamental distinction between that racial division in an environment which was the result of government directives or actions, and that racial division which is nothing more than the outgrowth of societal living patterns unenforced by government action of any kind.

Step by step we have witnessed the incursion by courts and administrative agencies into virtually every walk of the citizenry's life. Jobs for minority groups have been ordered to be created by "uncreating" them for their existing white occupants. Minority quotas for schools have been ordered to be met by compulsory busing of children, both black and white, great distances into strange neighborhoods. In all of this, the effect on the individual children has been lost sight of. More and more it has become statistical integration for the sake of statistical integration which is the desired goal. No matter what the effect on the individual child in question, the ultimate goal is that it be good for the group affected. The burden of these new group rights is placed upon the backs of guiltless individuals. See concurring opinion in *Austin Indep. School Dist.* v. *United States,* 50 L.Ed.2d 603, 605, n. 7 (Dec. 6, 1976).

This has now been carried to the extreme that even standards of individual excellence—so long the hallmark of our civil service system and our college system across the nation—have virtually been scrapped in favor of sociological goals. If insufficient numbers of a minority have in the past been admitted under the standards of the professional school involved, it is now to be deemed *ipso facto* proved that those standards discriminated against the group. The fact that no individual member of that group was discriminated against and that the school may have gone out of its way to assist some members of that group in entering its halls, is held for naught. It is not the individual "person" (U.S. Const., Amendment 14) but the group, which is now to be counted in ascertaining whether or not the Constitution's guarantees have been met.

This concept of group statistical rights is destructive of everything that in the past has contributed so much to the growth, vigor, and well-being of our society. The nation's approach to allocating resources is rapidly degenerating into nothing but a racial and ethnic group quota system. Whatever other face one may put on it, the undeniable fact remains that this is precisely the kind of system which for so many centuries was used to disadvantage members of the group we represent—the Jewish people. It is the *numerus clausus* by which the numbers of Jews in universities were controlled in Germany, Austria, and Russia. It is the same *numerus clausus* under which the proportion of Jews in Russian professions and universities is being radically reduced today. It is that very system which our own Government so loudly protests in international forums against the Soviet Union. Yet it is that same system—and nothing else—which is being forced upon us by the well-meaning but exceedingly self-destructive doctrines that have been foisted upon our society under the guise of "affirmative action."

The outlines of future shock generated by today's group quota doctrines are already taking shape: group after group is succeeding in achieving "minority" status. Every government agency has its own brand of "minority" groups. In New York City's public schools, children and teachers have been classified according to origin as black, Puerto Rican, oriental, native American, and "others", all in vain pursuit of the racial balancing of teacher-pupil ratios for its own sake. N. Y. Times, Apr. 23, 1977, pages 1, 47. Who such "others" are has been defined in one case by the Department of Agriculture to include Hasidic Jews as a disadvantaged minority group entitled to priority in having the Department accept their bids on Department contracts. Most recently, the administration of the City University of New York has determined that New Yorkers of Italian origin are now also to be classified as a "disadvantaged minority" and to be afforded such preferred status for hiring as university staff (memorandum of Chancellor Kibbee of C.U.N.Y. dated December 9, 1976).

There is plainly no end to the insidious implications of this pernicious doctrine—no end, that is, but the total destruction of what we have known as the American way of life under our Constitution. We are witnessing the imposition of a new and hitherto unknown system in this nation under which ultimately, before any child can enter public school, before any person can obtain a job, and before any person can buy a home in a neighborhood (this is yet to come), such person will be required to specify his race, color and national origin and it will then have to be determined whether that person as a member of that group is qualified to study, work, or live there.

What we have presented here as a spectre of things to come is not far-fetched. It is a figment of no one's imagination. In part, at least, it has already arrived. It requires only this Court's reversal of the decision of the California Supreme Court below to put the final imprimatur on this process of wholesale revision of American society along racial, ethnic, and religious lines.

We urgently plead with this Court to reverse this trend, not to reverse the decision below. We earnestly urge a return to the salutary principle of *individual,* not group, rights; of *individual* standards of excellence, not membership in any particular racial or ethnic group.

> "In our democracy, rights are accorded primarily to individuals, as distinguished from groups. Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open those doors in the first place." *Pennsylvania* v. *O'Neill,* 41 L.W. 2162 (9/14/72); *superseded en banc,* 473 F.2d 1029 (3d Cir., 1973).

We are the last to deny that wrongs have in the past been committed against the ethnic and racial groups for whose benefit the quota plan in issue—as well as many other like plans—was devised. We would be the last to suggest that such discrimination was ever right or that any form of it should ever be returned to. We do not deny the desirability of a progressive government's searching for and attempting to find some means to redress such wrongs (although we point out that no such redress was ever attempted or afforded to the members of the minority group we represent—the Jewish people).

We do, however, urge, that such governmental activity to extirpate racial prejudice must not be at the expense of the innocent citizenry as a whole or of members of other ethnic and minority groups. Redress at the expense of the innocent is not redress at all; it is simply the creation of future grievances and resentments on the part of other groups, which can only escalate and redound to the exacerbation of racial tensions and the disadvantage of our society as a whole. See *Hughes* v. *Superior Court of California,* 339 U.S. 460, 464 (1950). And it is destructive and subversive of the concept of individual human rights on which this society is founded and by reason of which, to date, it stands first in the world as a champion of such rights.

Ethnic, religious, and racial surveys and censuses* by governmental agencies, followed by decrees to "integrate" statistically on an ever more compounding basis (as populations shift year by year and day by day), are things without end; they make the public ever more conscious and cognizant that ours is a race-minded society. They engender racial tensions and prejudice where there should be racial understanding and sympathy. They ignore the individual and glorify the group. They are everything that a democratic society should not be.

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*For a short description of ethnic survey form EEO-4, see *United States* v. *State of New Hampshire,* 539 F. 2d 277, at 279, n. 1 (1st Cir. 1976).

Conclusion.

Wherefore we urge that the decision of the Supreme Court of California below should be in all respects affirmed.

Respectfully submitted,

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